RECORD AND BRIEFS

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In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

–v–

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for Writ of Certiorari to the South Dakota Supreme Court

BRIEF OF AMICUS CURIAE SOUTH DAKOTA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The South Dakota Retailers Association ("SDRA") was founded in 1897 as the South Dakota Retail Merchants Association. Eighty-five business owners joined together in the summer of that year to draft a constitution and bylaws for the organization. From the official records of SDRA, the charter members agreed that their aim was to improve and increase the business being done by the merchants of South Dakota. Interestingly, membership was not allowed for catalog houses or anyone doing business with catalog houses as such activities were seen at that early date as a challenge to the retail businesses of South Dakota. In 1906, Montgomery Ward and Company sued SDRA claiming conspiracy amongst other charges while seeking an injunction on the Board's activity. SDRA prevailed.[2]

Today, SDRA has over 3,700 members and ranks as one of the largest retail associations in the nation. The members of SDRA operate in over 160 categories of business.

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[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus,* its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *Montgomery Ward and Co. v. South Dakota Retail Merchants' and Hardware Dealers' Ass'n et al.,* 150 F. 413 (Circuit Court. D. South Dakota, 1907).

The issue presented to the Court in the Petitioner's request for Certiorari is not a new one to SDRA. In the resolutions passed at the June 1937 SDRA board meeting, the board at the time resolved:

> . . . in as much as a measure is now before our national congress, which would compel the collection of sales tax by chain stores and mail order houses, without the state in which the consumer lives and compel a remittance of these sales taxes to the federal government with a return to the state of consumer residence; we ask our South Dakota congressional members to work toward enactment of this law, and that they be advised by our Secretary.

Even with no record to speak of the impact of chain stores and mail order houses in 1937, we believe it is safe to assume that e-commerce and the ease with which items are bought, sold and shipped across state lines impacts the members of SDRA today, much the same as was the case in 1937 with mail order sales escaping sales tax at that time. Eighty years later, South Dakota retailers are still waiting for this concern to be addressed.

Currently under South Dakota Law, a member of SDRA ("Member") is held responsible for collecting sales tax due to the State and any municipality. *See*, SDCL § 10-45 et seq. The Member may collect from the customer the sales tax that is due and owing on a purchase. *See*, SDCL § 10-45-22. The Member holds that money in trust for the State of South Dakota and remits it as provided by law. *See*, SDCL § 10-45-

27.3. Today, as a result of the *Quill*[3] decision, an online retailer without a physical presence in the State of South Dakota is not required to collect or remit sales tax from a South Dakota consumer or customer. *See*, *Quill* generally. For this reason, SDRA has a substantial interest in the Court's review of the decision below. The economic playing field for the members of SDRA is not level versus our internet brethren. Overturning *Quill* as the Petitioner seeks is an important step to allow for fair competition amongst businesses, both within and outside of South Dakota.

INTRODUCTION

It should be noted that over 100 online retailers are voluntarily collecting and remitting sales tax on transactions with South Dakota consumers as a result of the 2016 legislation passed in South Dakota known as Senate Bill 106.[4] *See*, SDCL § 10-64, et seq. This voluntary compliance takes away any argument the Respondent would make on the difficulty of such collection and remission.

If an internet retailer chooses not to collect and remit sales tax, a South Dakota consumer is required under SDCL § 10-46 et seq. to submit and pay use tax for items purchased online. By *Quill* allowing online

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[3] *Quill Corporation v. North Dakota*, 112 S. Ct. 1904 (1992).

[4] South Dakota Department of Revenue presentation to the interim joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf

retailers to avoid the requirement of collecting sales tax from the consumer, the result has been stagnant sales tax growth in the State of South Dakota even as internet commerce continues to grow. Most consumers, frankly, do not know use taxes may be owed with online purchases. *See*, Kelly Phillips Erb. "Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" *Forbes*, March 27, 2017.[5] This Court is well aware of the fact that use tax is often not reported and paid by the consuming public. As Justice Thomas stated, "voluntary compliance with the latter requirement (use tax) is relatively low, leading to a significant loss of tax revenue, especially as internet retailers have increasingly displaced their brick-and-mortar kin." *Direct Market Association v. Brohl*, 135 S. Ct. 1124, 1127 (2015).

In attempting to obtain what is owed as use tax, the State of South Dakota issues a use tax information packet decrying "it's a matter of fairness." *See*, South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June 2016.[6]

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[5] Citing as evidence that use tax payments do not keep pace with sales a 2015 International Council of Shopping Centers poll that found 62% of registered voters were not aware that use taxes were payable with online purchases.

[6] The document states in part, "It's a matter of fairness . . .With the ease of purchasing over the Internet, online sales have exploded over the years and are increasing every year. Main street businesses, the ones who employ our citizens, pay property tax and support local organizations, are at a 6.5% competitive disadvantage since most out-of-state businesses are not required to pay tax in a state where they have no physical presence. It becomes the purchaser's responsibility to pay the use tax that is due." *Id.*

http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf

At the same time, internet sales nationally, and by logical extension in South Dakota, have continued to grow at a rate much higher than retail industry sales as a whole. *See*, "National Retail Federation Estimates 8-12% U.S. E-commerce growth in 2017." *Business Insider*, February 10, 2017.[7] According to the U.S. Department of Commerce, e-commerce sales in the second quarter of 2017 increased 16.2% from the second quarter of 2016. *See*, U.S. Department of Commerce Quarterly Retail E-Commerce Sales, August 17, 2017. Total retail sales increased only 4.1% in the same period. *Id.* In a recent survey by Deloitte, LLP, consumers now for the first time expect the majority of their holiday spending to occur online. *See*, Deloitte, LLP, 2017 Holiday Survey, at 17, October 24, 2017.

In the case now seeking to be reviewed by this Court, the South Dakota Supreme Court recognized that "South Dakota has no state income tax and relies on retail sales and use tax for much of its revenue . . . (and) (a)s internet sales by these sellers (e-commerce) have risen, state revenues have decreased." *South Dakota v. Wayfair*, 2017 WL 4051554 (SD 2017). The South Dakota Legislature found in 2016 that

> The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products trans-

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[7] Citing the National Retail Federation, which expects online retail to grow 8-12% for 2017, which may be up to three times higher than the retail industry in general.

> ferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;[8] and (t)he structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.[9]

REASONS FOR GRANTING THE PETITION

I. COMPETITIVE DISADVANTAGE

Selling and buying a product in the unique rural marketplace that is South Dakota is difficult. South Dakota is a state with a population of 865,454 (2016 estimate)[10] ranking it 46 amongst 50 in population yet 17 amongst 50 in geographical size.[11] With the cost of a good sold in South Dakota subject to collection of sales tax adding as much as six and one-half

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[8] SDCL § 10-64-1(1).

[9] SDCL § 10-64-1(4).

[10] U.S. Census Bureau, Annual Estimates of Resident Population for the United States Region, States and Puerto Rico: April 1, 2010 to July 1, 2015.

[11] U.S. Census Bureau, State Area Measurements (2010).

percent to the cost of an item versus an identical item sold online the unfair business advantage of the e-commerce company not collecting and remitting sales tax is obvious. Logic dictates that consumers will buy the less expensive item if they are in fact the same item.[12] This as the online shopping public has gone from 22% of Americans in 2000 to 79% of Americans who now say they purchase items online. *Id at 5.*

At the same time online sales have continued to increase the responsibilities felt by local businesses in their communities have not decreased. The continued need to support community activities and events has not diminished. As a result of e-commerce sales based on a competitive advantage, logically these local costs of doing business have taken a greater piece of the SDRA Members' operational budgets as sales continue to decline or face pressure. When the local school needs a sponsor to help support its activities, it does not reach out to Wayfair, it reaches out to the local hardware store. Moreover, the very jobs that retailers create in South Dakota face the competitive disadvantage our businesses deal with in the *Quill* environment. Lower sales due to unfair tax rules can only translate to fewer small businesses in South Dakota and fewer jobs available.

Justice Kennedy recognized in his concurrence in *Brohl,* that there is an "unfairness to local retailers

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[12] Not surprisingly, in a Pew Research Survey, when asked, 65% of online consumers stated they would make a purchase based on price in looking at a purchase being made online or in a physical store. *See,* "Online Shopping and E-Commerce." *Pew Research Center,* at 8, December 19, 2016.

and their customers who do not pay taxes at the registers" as a result of e-commerce transactions not subject to point of sales tax collection. *Brohl,* Kennedy concurring at 1135. This avoidance of tax collection in the e-commerce sphere, the outgrowth of *Quill,* causes, "extreme harm and unfairness to the States." *Brohl,* Kennedy concurring at 1134.

II. Weakness In Sales Tax Revenues

A weakness in the growth of sales tax revenues has forced the regulatory authorities in the State of South Dakota to increase their audit activities and efforts at collecting sales and use taxes. With slowing sales tax revenues, the State necessarily must step up its enforcement efforts of businesses that it can regulate and audit to seek out taxes that have not been remitted and may be owed to the State of South Dakota. *See,* letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee interim meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17lettertorevenuedoc2.pdf. Such efforts bring additional audit risks and costs for SDRA members. Such risks and costs are avoided by online sellers due to *Quill.*

For the fiscal years 2014, 2015 and 2016, the State of South Dakota saw a year over year average increase in sales tax revenues of 1.80 percent.[13] What

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[13] *See,* South Dakota Comprehensive Annual Financial Report for fiscal year ending June 30, 2016, at 176. For the year ending June 30, 2014 sales tax revenues were $858,001,000. For the year ending June 30, 2015, they were $871,402,000. For 2016 they were $905,475,000.

is interesting in these statistics is that the retail trade industry in South Dakota represents approximately 38% of the reporting filers in the fiscal year ending 2016. But that 38% represents a disproportionately large 52.66% of the taxable sales. *Id.* at 180. SDRA Members represent the tax collecting hub for South Dakota and need to be able to compete in order for South Dakota to obtain the tax revenue it needs.

This experience in South Dakota, as witnessed in sales tax collections, clearly does not meet with or coincide with the continued online sales growth. *See* above at 5. Rather, it clearly points to the problem of tax receipts not capturing the growth in internet sales.

Again, this out flight of unattainable tax revenue due to the increase of e-commerce sales has, as was pointed out by Justice Kennedy, hurt the State. "*Quill* now harms states to a degree far greater than could have been anticipated earlier." *Brohl,* Kennedy concurring at 1135.

As is often the case, your argument is sometimes best made by your opponent. In a press release opposing the market place fairness act, an effort to bring legislation overturning the physical presence requirement found in *Quill,* the National Taxpayers Union ("NTU") stated that for the ten years following 2015, the implementation of such legislation could amount to $340 Billion in additional taxes collected. Douglas Kellogg. NTU press release, October 31, 2014. In a similar release by NTU in June of 2015, the Executive Vice President of NTU commented that consumers would be required, if similar legislation passed, to pay "hundreds of billions of dollars in addi-

tional sales tax . . . " Douglas Kellogg. NTU press release, June 15, 2015. Obviously, these additional taxes are simply the amounts that should be captured by use tax and are due and owing the states where the consumers live, work and buy products online. The revenues (taxes) escape collection at the State level due to *Quill's* physical presence test. It is time for that to change.

CONCLUSION

For these reasons, and those stated by the Petitioner, SDRA urges the Court to grant the petition for Certiorari and reverse the decision below.

Respectfully submitted,

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